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## **BUNDLE OF JOY: WHY SAME-SEX MARRIED COUPLES HAVE A CONSTITUTIONAL RIGHT TO ENTER INTO GESTATIONAL SURROGACY AGREEMENTS**

*Benjamin H. Berman\**

### **I. INTRODUCTION**

James and Ryan are a gay couple from New Orleans, Louisiana. They are both forty years old, have been married for five years, and decide that they are ready to expand their family. The men want to use a gestational surrogate to have their first child.<sup>1</sup> With the help of a friend, the couple finds Sarah, a healthy, 30-year-old woman who is also a resident of New Orleans. During an interview, the men explain to Sarah that James and his lifelong friend Rachel will be the genetic parents of the couple's child. Sarah says she would be delighted to help the men embark on their parenthood journey. The couple and Sarah sign a contract in which the men agree that Sarah will carry their child to term.<sup>2</sup> A few weeks later, an embryo is created and then transferred to Sarah.<sup>3</sup>

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<sup>1</sup> *Gestational Surrogacy (Surrogate Mother) Definition*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION (1<sup>st</sup> ed. 2012). "Gestational Surrogacy" is defined as "the process by which one woman conceives, carries, and births the child of another woman or for another person to whom she will give the child after birth for care, apart from herself." *Id.*

<sup>2</sup> *Legal Aspects of Domestic Gestational Carrier Agreements*, RESOLVE, <https://resolve.org/what-are-my-options/surrogacy/legal-aspects-of-domestic-gestational-carrier-agreements/> (last visited Sep. 14, 2020) ("[A] gestational carrier contract is an agreement between intended parents and a gestational carrier and her

With their plans set in motion, the men decide that they want to have a local family law attorney, Steven, look over their gestational surrogate contract. When they meet with Steven, he informs them that their contract is not enforceable under Louisiana state law. Louisiana law bans compensated gestational surrogacy agreements for all couples.<sup>4</sup> In addition, Louisiana only allows those “intended parents” who would use their own “gametes” to enter into altruistic gestational surrogacy agreements in the state.<sup>5</sup> However, their legal headaches would not end there. “Pre-birth parentage orders” are limited to the “intended parents” as defined by the surrogacy statute.<sup>6</sup> This means that neither James nor Ryan would be listed as the child’s parent on her birth certificate.<sup>7</sup> Instead, Sarah alone would be listed as the child’s mother.<sup>8</sup> To establish their legal parentage, the men will be

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partner/spouse, if any. These contracts can be compensated or uncompensated and are intended to detail the parties’ rights, obligations, intentions, and expectations in connection with their arrangement.”).

<sup>3</sup> Dr. Paul C. Magarelli, *Embryo Transfer: What It Is, What to Expect, The Different Types, and More*, CNY FERTILITY (Sept. 25, 2020),

<https://www.cnyfertility.com/embryo-transfer/> (“An embryo transfer is the final stage in the In Vitro Fertilization (IVF) process where the fertilized egg—now an embryo—is placed in the woman’s uterus.”).

<sup>4</sup> LA. STAT. ANN. § 9:2718.1 (2016) (“Compensation” means a payment of money, objects, services, or anything else having monetary value. Compensation shall not include reimbursement of actual expenses, as provided for in R.S. 9:2720.5(B)(3), to the gestational carrier or payment for goods or services incurred by the intended parents as a result of the pregnancy and that would not have been incurred but for the pregnancy.”); § 9:2720 (C.) (“No person shall enter into a gestational carrier contract for compensation as defined in R.S. 9:2718.1 or that is not in compliance with all of the requirements of this Part. Any such contract executed in the state of Louisiana or any other state shall be absolutely null and unenforceable in the state of Louisiana as contrary to public policy.”).

<sup>5</sup> *Id.* § 9:2718.1 (2) (“Gamete” means either a sperm or an egg.”); § 9:2718.1 (6) (“Intended parents” means a married couple who each exclusively contribute their own gametes to create their embryo and who enter into an enforceable gestational carrier contract, as defined in this Chapter, with a gestational carrier pursuant to which the intended parents will be the legal parents of the child resulting from an in utero embryo transfer.”).

<sup>6</sup> *The Center for Surrogate Parenting walks you through Louisiana surrogacy law*, LA. SURROGACY L. OVERVIEW, <https://www.creatingfamilies.com/us/louisiana-surrogacy-law-overview/> (last visited Nov. 20, 2020).

<sup>7</sup> *Id.*

<sup>8</sup> Richard Vaughn, *Louisiana Surrogacy Bill Advances from Bad to Worse*, Int. Fertility L. Group, <https://www.iflg.net/louisiana-surrogacy-bill-advances-from-bad->

forced to partake in post-birth adoption proceedings.<sup>9</sup> James and Ryan are outraged by the Louisiana legislature's decision to make gestational surrogacy an arduous undertaking for same-sex married couples in the state. They decide to sue Louisiana in federal court for violating their constitutional rights. Their claim rests on the fundamental right to raise children, through the Fourteenth Amendment's Due Process Clause.<sup>10</sup> They also raise a claim under the Fourteenth Amendment's Equal Protection Clause.<sup>11</sup> This Note will argue that Louisiana's bans on a same-sex married couple's ability to enter into either paid or altruistic surrogacy agreements are unconstitutional. The fundamental right to raise children should apply with equal force to same-sex couples who want to start their families by using a gestational surrogate. Gay people should be recognized as a protected class and laws that discriminate against them on the basis of their sexual orientation, like Louisiana's surrogacy statutes, should be held unenforceable.

Section II of this Note will discuss the different approaches that states have taken with regard to enforcing gestational surrogacy agreements. Section III will examine case law concerning a parent's rights to the "care, custody, and control of their child" and the application of those rights to a married couple's decision to use a gestational surrogate. Sections IV and V will discuss the landmark gay marriage Supreme Court decisions, focusing on how those cases render the disparate treatment of same-sex married couples unconstitutional under the Fourteenth Amendment's Substantive Due Process and Equal Protection Clauses. Section VI will analyze how a state's legalization of gestational surrogacy and adoption of the Uniform Parentage Act are legislative actions that can effectively safeguard the rights of married same-sex citizens who choose to use a gestational surrogate. Section VII will address the fundamental right of

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to-worse/ (last visited Nov. 20, 2020) (explaining that "[t]he surrogate is deemed the legal mother of the child, and the intended mother has no parental rights, even though the embryo may be the biological child of the intended mother and intended father.").

<sup>9</sup> *The Center for Surrogate Parenting walks you through Louisiana surrogacy law*, *supra* note 6.

<sup>10</sup> U.S. CONST. amend. art. XIV, § 1.

<sup>11</sup> *Id.*

same-sex married couples to enter into gestational surrogacy agreements under the United States Constitution.

## II. LEGALITY OF GESTATIONAL SURROGACY

Gestational surrogacy is governed by state law.<sup>12</sup> There are three categories used to identify the likelihood of the state enforcing a gestational surrogacy contract.<sup>13</sup> The three categories are “surrogacy-friendly,” “surrogacy-unfriendly,” and surrogacy neutral.<sup>14</sup> A state is viewed as surrogacy neutral when neither its statutes nor its caselaw makes clear whether a gestational surrogacy agreement would be enforced.<sup>15</sup>

“Surrogacy-friendly” jurisdictions explicitly permit gestational surrogacy contracts and protect the rights of both the intended parents and the gestational surrogate.<sup>16</sup> Illinois’ surrogacy laws, for example, deem that the intended parent of a child born from a gestational surrogate is the legal parent of the child immediately upon the child’s birth.<sup>17</sup> The purpose of establishing the intended parent’s pre-birth contractual parentage rights in a contract is to prevent a gestational surrogate from asserting a custody claim once the child is born.<sup>18</sup> Illinois law requires that a gestational surrogate understand her role as a mere carrier in the process by mandating that she obtain legal counsel for the agreement to be enforced.<sup>19</sup>

A “surrogacy-unfriendly” state is a state that denies the enforceability of gestational surrogacy agreements.<sup>20</sup> Michigan has de-

<sup>12</sup> *Intended Parents Surrogacy Laws by State*, SURROGATE.COM, <https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/surrogacy-laws-by-state/> (last visited Sep. 27, 2020).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> 2003 ILL. HB 4962 § 15 (a) (2) (2005). “The intended father shall be the father of the child for purposes of State law immediately upon the birth of the child.” *Id.*

<sup>18</sup> *Id.* § 15 (a) (5). (“Sole custody of the child shall rest with the intended parent or parents immediately upon the birth of the child.”).

<sup>19</sup> *Id.* § 20 (a) (5). (“She has undergone legal consultation with independent legal counsel regarding the terms of the gestational surrogacy contract and the potential legal consequences of the gestational surrogacy.”).

<sup>20</sup> *Intended Parents Surrogacy Laws by State*, *supra* note 12.

terminated that gestational surrogacy contracts violate state public policy.<sup>21</sup> Currently, Michigan is the only state that falls into this category.<sup>22</sup>

Surrogacy-neutral states do not clearly define what, if any, protections are afforded to intended parents and gestational surrogates in the state.<sup>23</sup> While there are no gestational surrogacy laws in Kentucky, for example, an intended parent in the state may still obtain a pre-birth order if they are biologically related to the child.<sup>24</sup> Louisiana is another example of a state that has permitted surrogacy only under limited circumstances.<sup>25</sup> These circumstances include when the agreement is altruistic in nature and the intended parents are a married opposite-sex couple.<sup>26</sup>

### III. SUBSTANTIVE DUE PROCESS AND THE “CARE, CUSTODY, AND CONTROL” OF A CHILD BY A PARENT

#### A. U.S. Supreme Court Case Law

In *Troxel v. Granville*,<sup>27</sup> the Supreme Court affirmed the fundamental right of parents to make decisions concerning the “care, custody, and control of their children.”<sup>28</sup> The case involved an unmarried couple, Brad Troxel and Tommie Granville, who had two daughters together.<sup>29</sup> Brad and Tommie later separated but their children continued to have a relationship with Brad’s parents, Gary and Jennifer Troxel.<sup>30</sup> Brad committed suicide and Tommie sought to limit her daughters’ time with their paternal grandparents.<sup>31</sup> The Troxels responded by filing a visitation petition with the Washington

<sup>21</sup> MICH. COMP. LAWS SERV. § 722.855 § (5) (LexisNexis 2020).

<sup>22</sup> *Intended Parents Surrogacy Laws by State*, *supra* note 12. The law in New York recently changed and it is no longer a surrogacy-unfriendly state.

<sup>23</sup> *Id.*

<sup>24</sup> *Surrogacy Laws by State*, LPG, <https://connect.asrm.org/lpg/resources/surrogacy-by-state?ssopc=1>, (last visited Sep. 27, 2020).

<sup>25</sup> LA. STAT. ANN. § 9:2720.1 (C.) (2016).

<sup>26</sup> *Id.*

<sup>27</sup> 530 U.S. 57 (2000).

<sup>28</sup> *Id.* at 66.

<sup>29</sup> *Id.* at 60.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 60-61.

Superior Court, that was later granted by the Washington Supreme Court.<sup>32</sup> The basis for the Troxels' petition was a Washington statute.<sup>33</sup> When Tommie appealed, the Washington Supreme Court found that the Troxels should not have been granted visitation rights.<sup>34</sup> The court rested its decision on the Federal Constitution.<sup>35</sup> The Supreme Court granted the Troxels' petition for certiorari.<sup>36</sup>

The United States Supreme Court reviewed whether granting the Troxels' visitation under the Washington statute would violate Tommie's Fourteenth Amendment Due Process rights.<sup>37</sup> The Court addressed this issue through its application of the substantive component of the Due Process Clause.<sup>38</sup> The Court noted that this substantive component "provides heightened protection against government interference with certain fundamental rights and liberty interests."<sup>39</sup> Tommie's liberty interest here was the "care, custody, and control" of her children.<sup>40</sup> Based on long-standing precedent, the Court determined that, under the Due Process Clause, this liberty interest applies to two important facets of the parent-child relationship.<sup>41</sup> The first is a parent's right to "establish a home and bring up children."<sup>42</sup> The second is a parent's right to "control the education of their own [children]."<sup>43</sup> Essentially, both of these rights protect a parent's ability to preside over the upbringing of their children.<sup>44</sup> The Court reasoned that the Washington statute at issue infringed on the fundamental right of parents to raise their own children.<sup>45</sup> The statute was unconstitutional because it was "breathhtakingly broad."<sup>46</sup> The law gave

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* ("[A]ny person [may] petition the court for visitation rights at any time.") (citing Rev. Code Wash. (ARCW) § 26.10.160(3) (1994)).

<sup>34</sup> *Id.* at 63.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 65.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (quoting *Wash. v. Glucksberg*, 521 U.S. 702, 720 (1997)).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

<sup>43</sup> *Id.* (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 67.

<sup>46</sup> *Id.*

sweeping authority to third-parties to assert visitation claims.<sup>47</sup> Further, once a claim was asserted, Washington state judges had the authority to subvert a parent's will by ruling in favor of the visitation claim.<sup>48</sup>

The Court determined that the Superior Court erred in granting the Troxels' visitation petition under the statute.<sup>49</sup> Finding a lack of "special factors" to warrant the State's involvement in Tommie's child-rearing choices, the Court noted that Tommie was a fit parent whose parentage decisions should have been afforded the presumption of being in her children's best interests.<sup>50</sup> The Superior Court incorrectly looked to the children's best interest by forcing Tommie to disprove that "visitation would be in the best interest of her daughters."<sup>51</sup> Finally, the Court pointed out that Tommie did not intend to entirely exclude her children's paternal grandparents from their lives.<sup>52</sup> The fact that Tommie agreed to "one day of visitation per month" proved to the Court that her proposal should have been reasonable to the Superior Court.<sup>53</sup> Tommie made this decision based on what she believed was right for her children.<sup>54</sup> Considering these factors, the Court determined that enforcing the statute violated Tommie's constitutionally protected parental decision to limit the Troxels' visitation.<sup>55</sup> The Court thus affirmed the Washington Supreme Court's decision.<sup>56</sup>

## B. State Court Case Law

*P.M. v. T.B.*<sup>57</sup> is an Iowa case that also applied *Troxel's* principles of parentage rights to gestational surrogacy agreements.<sup>58</sup> This case involved P.M. and C.M., a married couple who had children

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 68.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 69.

<sup>52</sup> *Id.* at 71.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 72.

<sup>55</sup> *Id.* at 75.

<sup>56</sup> *Id.*

<sup>57</sup> 907 N.W.2d 522 (Iowa 2018).

<sup>58</sup> *See id.*



from a prior marriage.<sup>59</sup> The couple decided that they wanted to have their own baby together through gestational surrogacy since C.M. could no longer conceive.<sup>60</sup> They advertised on Craigslist seeking a surrogate.<sup>61</sup> T.B. and her husband D.B. responded to the advertisement and set up a meeting with the Ms.<sup>62</sup> The couples got along well in the beginning and came to an agreement that T.B. would “gestate two embryos fertilized in vitro with P.M.’s sperm and the eggs of an anonymous donor.”<sup>63</sup> The contract stated that the Ms would adopt one of the babies in exchange for the Ms agreeing to pay for T.B.’s in vitro fertilization (IVF) procedure and her prenatal expenses.<sup>64</sup> However, the relationship between the Ms and the Bs later deteriorated and communications between the parties stopped almost entirely.<sup>65</sup> T.B. lost one of the babies after childbirth and decided that she wanted to keep the other baby, Baby H.<sup>66</sup> Although they were not informed about the birth, the Ms suspected that the childbirth had occurred and two months later, “filed a motion for an emergency ex parte injunction.”<sup>67</sup> The district court ruled that the surrogacy agreement was enforceable and that the Ms were therefore Baby H’s parents.<sup>68</sup>

The Iowa Supreme Court decided whether the enforcement of the surrogacy contract violated T.B.’s rights under the United States Constitution.<sup>69</sup> The court noted that the Iowa legislature had affirmed its legislative stance that neither traditional nor gestational surrogacy agreements violated state law.<sup>70</sup> The court also pointed out that gestational surrogacy agreements in the state are presumed valid under the law.<sup>71</sup> It was then determined by the court that the surrogacy agreement between the Ms and the Bs did not violate a state criminal

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<sup>59</sup> *Id.* at 525.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 526.

<sup>65</sup> *Id.* at 527.

<sup>66</sup> *Id.* at 528.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 529.

<sup>69</sup> *Id.* at 530.

<sup>70</sup> *Id.* at 533.

<sup>71</sup> *Id.* at 535.

statute that banned the sale of babies.<sup>72</sup> The Ms did not violate the statute because they were paying T.B. for her services as a gestational carrier, and were not selling the baby.<sup>73</sup> The court found that P.M. was the legal parent of Baby H because the surrogacy agreement was enforceable.<sup>74</sup> The court reasoned that constitutional rights vested in the “biological and intended” parent of Baby H, and that no such rights should be conferred upon Baby H’s gestational carrier.<sup>75</sup> Thus, the court determined that “P.M.’s undisputed status as the biological and intended father of Baby H” trumped any constitutional rights T.B. had over Baby H.<sup>76</sup> The court therefore held that the Ms were the legal parents of Baby H.<sup>77</sup>

*Troxel* reaffirmed that a parent’s ability to choose how to provide for the “care, custody, and control of their children” is the cornerstone of the substantive due process rights to make familial decisions.<sup>78</sup> The Iowa Supreme Court in *P.M. v. T.B.* expanded on this foundation by providing that gestational surrogacy agreements are enforceable in Iowa.<sup>79</sup> Substantive due process rights therefore should include entrusting intended parents, who are to be the unborn child’s legal parents, with the authority to make parental decisions on behalf of their unborn child.

#### IV. SUBSTANTIVE DUE PROCESS AND THE RIGHTS OF SAME-SEX MARRIED COUPLES

##### A. U.S. Supreme Court Case Law

In *Obergefell v. Hodges*,<sup>80</sup> the Supreme Court reviewed numerous state court cases that banned same-sex marriage.<sup>81</sup> The Court decided two issues. The first issue was whether the Fourteenth Amendment mandated that, upon request, states must issue same-sex

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<sup>72</sup> *Id.* at 536.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 543.

<sup>75</sup> *Id.* at 542.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 543.

<sup>78</sup> *Troxel v. Granville*, 530 U.S. 57, 74 (2000).

<sup>79</sup> *T.B.*, 907 N.W.2d at 543.

<sup>80</sup> 576 U.S. 644 (2015).

<sup>81</sup> *See id.*

couples marriage licenses.<sup>82</sup> The second issue was whether, under the Fourteenth Amendment, states that had not yet legalized same-sex marriage were required to affirm the validity of same-sex marriage licenses provided by the states that recognized same-sex marriage.<sup>83</sup> These issues implicated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>84</sup> The Due Process Clause will be discussed in this section. The Equal Protection Clause will be discussed in the next section.

The Court reasoned that four principles of opposite-sex marriage applied with “equal force to same-sex marriage.”<sup>85</sup> These four principles show that marriage is a fundamental right that should apply to same-sex couples.<sup>86</sup> The first principle discussed is the importance of a person’s ability to choose whom he wants to marry.<sup>87</sup> The Court noted that this decision is one of the most intimate decisions a person can make, comparing it to “choices concerning contraception, family relationships, procreation, and childrearing.”<sup>88</sup> The Court reasoned that the intimate nature of the decision entitled same-sex couples to the same dignity and respect as opposite-sex married couples.<sup>89</sup> The second principle analyzed is the support provided by the institution of marriage to two committed people.<sup>90</sup> The Court suggested that marriage helps to assuage fears that no one will be there to care for them in their old age through offering the “hope of companionship.”<sup>91</sup> Such companionship, in the Court’s view, should not be denied to same-sex couples who deserve “the full promise of liberty” in their intimate associations.<sup>92</sup>

The third principle is the role of marriage in protecting the rights of children and families and “draws meaning from related

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<sup>82</sup> *Id.* at 656.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 675.

<sup>85</sup> *Id.* at 665.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 666.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 667.

<sup>92</sup> *Id.*

rights of childrearing, procreation, and education.”<sup>93</sup> The Court adeptly pointed out that, at the time of the oral argument in *Obergefell*, “hundreds of thousands of children” were being brought up by same-sex couples.<sup>94</sup> The children of these couples stood to benefit from the stability that a marriage relationship would give their parents.<sup>95</sup> And finally, the fourth principle is the notion that “marriage is a keystone of our social order.”<sup>96</sup> The Court emphasized that marriage helps to promote the well-being of our society.<sup>97</sup> States have long been encouraging marital unions by linking rights exclusively to them.<sup>98</sup> It was therefore unfair in the Court’s view for states to deny same-sex couples the opportunity to experience these benefits through their own unions.<sup>99</sup> At the conclusion of his opinion, Justice Kennedy expressed his view on why it was essential for same-sex couples to be able to fully enjoy the institution of marriage in the United States of America.<sup>100</sup> In the Justice’s eyes, “[n]o union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family.”<sup>101</sup>

The Court determined that banning same-sex marriage was unlawful because the four principles and traditions of marriage apply equally to couples in same-sex unions.<sup>102</sup> The Court thus held that same-sex marriage was a right protected by the Fourteenth Amendment of the Constitution.<sup>103</sup>

## B. State Court Case Law

In 2019, the Utah Supreme Court relied on *Obergefell* when addressing the issue of whether a married same-sex couple’s gestational surrogacy agreement was enforceable. In *In re Gestational*

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 668.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 669.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 670.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 681.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 670.

<sup>103</sup> *Id.* at 681.

*Agreement*,<sup>104</sup> N.T.B. and J.G.M., a “married same-sex male couple,” entered into a gestational surrogacy contract with D.B. and G.M., an “opposite-sex married couple.”<sup>105</sup> The couples asked the Utah district court to validate their agreement, but the court refused.<sup>106</sup> At issue was section 78B-15-803 of the Utah Code which limited the enforcement of gestational surrogacy agreements to situations where “medical evidence shows that the intended mother is unable to bear a child or is unable to do so without unreasonable risk to her physical or mental health or to the unborn child.”<sup>107</sup> The district court reasoned that “the word ‘mother’ and ‘her’ plainly refer to a woman.”<sup>108</sup> The court concluded that since neither of the child’s intended parents was a woman, the agreement between the parties violated Utah law.<sup>109</sup>

The Utah Supreme Court considered whether the state statute that limited gestational surrogacy to opposite-sex couples was constitutional.<sup>110</sup> The court reasoned that the benefit of gestational surrogacy could not be enjoyed by same-sex couples in the state due to the statute.<sup>111</sup> As a result, the court noted that the statute was effectively denying these couples from being able to participate in a right that was explicitly linked to marriage.<sup>112</sup> However, this was not just an ordinary right, but a right that the court pointed out is “one of the most important benefits afforded to couples who may not be medically capable of having a biological child.”<sup>113</sup> The court decided that the “intended mother provision” of the statute violated the “due process rights” guaranteed to same-sex married couples by the Federal Constitution.<sup>114</sup>

*Obergefell* ensures that married same-sex couples are not prevented from enjoying any of the benefits that the state links exclu-

<sup>104</sup> 2019 UT 40, ¶ 1, 449 P.3d 69 (Utah 2019).

<sup>105</sup> *Id.* at 73.

<sup>106</sup> *Id.*

<sup>107</sup> Utah Code Ann. § 78B-15-803 (LexisNexis 2020).

<sup>108</sup> *In re Gestational Agreement*, 2019 UT 40, 73.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 74.

<sup>111</sup> *Id.* at 80 (explaining that Utah Code Ann. § 78B-15-803 (2020) violated *Obergefell*).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 82.

<sup>114</sup> *Id.*

sively to marriage. The reasoning in those cases applies to the gestational surrogacy agreements that Louisiana has rendered available exclusively to opposite-sex married couples. Excluding same-sex married couples like James and Ryan from gestational surrogacy agreements is both unconstitutional and unfair. This position was reflected in the Utah Supreme Court's decision in *In re Gestational Agreement*.

## V. EQUAL PROTECTION AND THE RIGHTS OF SAME-SEX MARRIED COUPLES

### A. U.S. Supreme Court Case Law

In *Pavan v. Smith*,<sup>115</sup> the Supreme Court affirmed its holding in *Obergefell*, maintaining that all married couples must be treated the same under the law.<sup>116</sup> *Pavan* involved two married same-sex couples from Arkansas where one of each of the partners had given birth to a child through artificial insemination.<sup>117</sup> The couples had each requested birth certificates that would list the names of both partners as their child's parents.<sup>118</sup> However, the Arkansas Department of Health ("Department") issued these couples birth certificates that contained only the name of the birth mother.<sup>119</sup> The Department argued that it was following an Arkansas statute which stated that a birth certificate was exclusively meant to contain the names of a birth mother and her husband.<sup>120</sup> The couples sued the Department, arguing that the statute violated the Constitution.<sup>121</sup> The Arkansas Supreme Court found for the Department, upholding the constitutionality of the statute.<sup>122</sup>

The United States Supreme Court, in a per curiam decision, reasoned that the Arkansas statute was inconsistent with *Obergefell*

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<sup>115</sup> 137 S.Ct. 2075 (2017) (per curiam).

<sup>116</sup> *See id.*

<sup>117</sup> *Id.* at 2077.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

because “it denied married same-sex couples access to ‘the constellation of benefits that the Stat[e] ha[s] linked to marriage.’”<sup>123</sup> The Court also acknowledged the import of accurate birth certificates since the document is often used by parents for the purposes of making decisions related to their child’s health and schooling.<sup>124</sup> By providing defective birth certificates, the Arkansas statute compromised the “rights, benefits, and responsibilities” of same-sex married couples.”<sup>125</sup> Thus, the Court reversed the Arkansas Supreme Court’s judgment on equal protection grounds.<sup>126</sup>

### B. State Court Case Law

The Maryland case *In re Roberto D.B.*<sup>127</sup> concerned the enforceability of a state statute that prevented a biological father from being listed as the father on his children’s birth certificates.<sup>128</sup> The biological father, Roberto D.B., utilized in vitro fertilization (IVF) with “his sperm being used to fertilize eggs from an anonymous egg donor.”<sup>129</sup> Two fertilized eggs were produced as a result of the procedure.<sup>130</sup> Roberto contracted with a woman to act as a gestational carrier.<sup>131</sup> On August 23, 2001, the carrier gave birth to twins.<sup>132</sup> In Maryland, “[t]he medical records department of a hospital is required to submit information regarding births to the Maryland Division of Vital Records (“MDVR”), a part of the Maryland Vital Statistics Administration.”<sup>133</sup> The MDVR then issues certificates of birth based on the information it receives from the hospital.<sup>134</sup> It was hospital policy to “report the gestational carrier as the ‘mother’ of the

<sup>123</sup> *Id.* at 2078 (quoting *Obergefell v. Hodges*, 576 U.S. 644, 670 (2015)) (alteration in original).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> 923 A.2d 115 (Md. 2007).

<sup>128</sup> *See id.* at 117; *see also* MD. CODE ANN., HEALTH-GEN. § 4-208 (LexisNexis 2021).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* (footnote omitted) (citing HEALTH-GEN. § 4-208(a)(4)(iii)).

<sup>134</sup> *Id.* at 118.

child to the MDVR.”<sup>135</sup> The hospital where the carrier gave birth, Holy Cross Hospital, complied with this policy and reported Roberto’s carrier as the mother.<sup>136</sup> Roberto and the carrier, however, did not want the carrier to be listed as the children’s mother.<sup>137</sup> The carrier was not genetically related to the children and she did not want a legal parentage relationship to be established between herself and the children.<sup>138</sup>

The two parties joined in a “petition to the Circuit Court for Montgomery County” to declare Roberto the legal father of the children.<sup>139</sup> Additionally, they wanted the hospital to report just the father’s name to the MDVR so that he could obtain accurate birth certificates for his children.<sup>140</sup> The circuit court denied the petition and refused to change the birth certificates.<sup>141</sup> The parties appealed to the Court of Appeals of Maryland.<sup>142</sup>

The issue before the Maryland Court of Appeals was whether the paternity statute “afforded equal protection of the law to men and women similarly situated” under the Maryland Equal Rights Amendment.<sup>143</sup> Under the law, men were able to deny paternity but women were not able to deny maternity.<sup>144</sup> This meant that a gestational surrogate, such as Roberto’s carrier, could not deny legal parentage of the child she carried despite having no genetic connection to the child.<sup>145</sup> The court reasoned that, at the time the paternity statute was written, the legislature could not have anticipated the commonplace use of assisted reproductive technologies to have children.<sup>146</sup> The court reasoned that the statute on its face could be “[i]nterpret[ed] . . . to extend the same rights to women and maternity

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 120 (“[E]quality of rights under the law shall not be abridged or denied because of sex.”) (citing Md. Dec. of R. art. 46 (1972))).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 122.



as it applies - and works quite well - to men and paternity.”<sup>147</sup> In reaching its decision, the court also noted the lack of competing parenting interests in this case.<sup>148</sup> The court explained that because Roberto was a fit parent, there was no reason to deny him the relief he wanted.<sup>149</sup> The court thus reversed the Circuit Court of Montgomery County’s judgment.<sup>150</sup>

Under *Pavan*, it is unconstitutional for Louisiana to refuse to issue James and Ryan a birth certificate with their names listed as the parents of their child. Louisiana is violating the rights guaranteed by the Equal Protection Clause by treating married same-sex couples differently from married opposite-sex couples. In order to rectify the issue, Louisiana must amend its gestational surrogacy statutes, following the holding articulated by the Maryland court in *In re Roberto D.B.* when it recognized that the child’s intended parent should be the child’s legal parent.<sup>151</sup> The new Louisiana statutes must include same-sex couples in the definition of “intended parents,” which would then legally permit same-sex couples to enter into gestational surrogacy agreements.

### C. The Equal Protection Clause Test

When a claim is brought under the Equal Protection Clause of the Fourteenth Amendment, the plaintiff must first show that the statute at controversy is either discriminatory on its face or is facially neutral but has a discriminatory effect and was passed with a discriminatory intent.<sup>152</sup> By proving discrimination, the plaintiff establishes a classification.<sup>153</sup> Suspect classification typically includes race, religion, or national origin.<sup>154</sup> Quasi-suspect classification generally in-

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<sup>147</sup> *Id.* at 125.

<sup>148</sup> *Id.* at 130.

<sup>149</sup> *Id.* at 131.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Cassidy Heiserman, *Punishing Indigency: Why Cash Bail is Unconstitutional Under the Equal Protection Clause*, DREXEL L. REV.: BLOG (Sept. 9, 2020), <https://drexel.edu/law/lawreview/blog/overview/2020/September/cash-bail/>.

<sup>153</sup> *Id.*

<sup>154</sup> *Levels of Scrutiny Under the Equal Protection Clause*, UMCK.EDU, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/epscrutiny.htm> (last visited Feb. 27, 2021).

cludes gender or sex.<sup>155</sup> Non-suspect classification is everything else, including age, wealth, or disability.<sup>156</sup>

Next, based on the discrimination, the court will determine what level of scrutiny should apply.<sup>157</sup> Strict scrutiny applies to statutes that affect suspect classes.<sup>158</sup> In order to pass strict scrutiny, the government defendant must show that the statute achieves a compelling purpose and that no non-discriminatory alternatives exist.<sup>159</sup> The factors that determine suspect classification of a group include the immutability of the trait that leads to classification, the political power of the group, the existence of a history of discrimination against the group, and whether prejudice continues to hold the group back from progress.<sup>160</sup>

Intermediate scrutiny applies to statutes that affect quasi-suspect classes.<sup>161</sup> The statute at controversy passes intermediate scrutiny when the government defendant can show that the statute accomplishes an important purpose and that the purpose can be achieved only through compliance with the statute.<sup>162</sup>

Rational basis applies to statutes that affect non-suspect classes.<sup>163</sup> The rational basis test requires that the plaintiff prove that the statute at controversy is not “rationally related to a legitimate government interest.”<sup>164</sup> Interestingly, the Supreme Court has been inclined to apply a heightened rational basis review, known as rational basis “with a bite,” to cases that involve discrimination against the gay community.<sup>165</sup> Under this theory, the Supreme Court has found

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Heiserman, *supra* note 152.

<sup>158</sup> *Levels of Scrutiny Under the Equal Protection Clause*, *supra* note 154.

<sup>159</sup> Heiserman, *supra* note 152.

<sup>160</sup> *Suspect Classification*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/suspect\\_classification](https://www.law.cornell.edu/wex/suspect_classification) (last visited Feb. 7, 2021).

<sup>161</sup> *Levels of Scrutiny Under the Equal Protection Clause*, *supra* note 154.

<sup>162</sup> Heiserman, *supra* note 152.

<sup>163</sup> *Id.*

<sup>164</sup> Note, *Let the End Be Legitimate: Questioning the Value of Heightened Scrutiny's Compelling- and Important-Interest Inquiries*, 129 Harv. L. Rev. 1406 (2016).

<sup>165</sup> *Rational Basis Test with Bite*, UMCK.EDU, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/rationalbasiswbite.htm> (last visited Feb. 28, 2021).

that state statutes intended to harm gays never serve a “legitimate governmental interest” and are therefore unenforceable.<sup>166</sup>

## VI. STATE LEGALIZATION OF GESTATIONAL SURROGACY AGREEMENTS

### A. Uniform Parentage Act

The Uniform Parentage Act (“UPA”) is a law adopted in 1973 by all the states to create “a way for the courts to identify a child’s legal parents, regardless of marital status.”<sup>167</sup> In 2002, the UPA was revised to recognize gestational surrogacy agreements.<sup>168</sup> Following *Obergefell*, the UPA was again modified in 2017.<sup>169</sup> One of the new provisions “add[ed] a rule for the states to establish a de facto parental status of a legal parent who is not biologically related to the child.”<sup>170</sup> The goal of updating the UPA was to protect the interests of children who are members of modern families.<sup>171</sup> States are not required to adopt the UPA’s revisions.<sup>172</sup>

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<sup>166</sup> *Romer v. Evans*, 517 U.S. 620 (1996). “If the constitutional conception of “equal protection of the laws” means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” *Id.* at 634 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534). *United States v. Windsor*, 570 U.S. 744 (2013). “DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government . . . In determining whether a law is motivated by an improper animus or purpose, “[d]iscriminations of an unusual character” especially require careful consideration.” *Id.* at 769-770 (quoting *Romer v. Evans*, 517 U.S. 620, 633).

<sup>167</sup> Melissa Heinig, *What Is the Legal Definition of a Parent Under the Uniform Parentage Act?*, LAWYERS.COM (Feb. 1, 2019), <https://www.lawyers.com/legal-info/family-law/paternity/legal-definition-parent-under-uniform-parentage-act.html>.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* The states that have adopted the 2017 provision include California, Rhode Island, Vermont, and Washington. The 2017 provision has been introduced in the Connecticut, Maine, and Pennsylvania legislatures. *2017 Parentage Act*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f> (last visited Feb. 27, 2021).

Across the country, advocates for gestational surrogacy have been fighting passionately for states to reform their antiquated parentage laws to ensure equality for all married couples.<sup>173</sup> The advocates' efforts have focused on lobbying states both to legalize gestational surrogacy agreements and to codify the vesting of legal parentage rights for intended parents, regardless of a parent's sexual orientation.<sup>174</sup> As a direct result of this push, Rhode Island decided it was time to embrace the UPA's revisions by adopting The Rhode Island Parentage Act in January 2021.<sup>175</sup> This law allows any married couple who intends to have a child through the use of a gestational surrogate to be able to obtain a parentage order.<sup>176</sup> A parentage order states who the intended parents are with an affirmation that all parentage rights will vest exclusively in the intended parents when the child is born.<sup>177</sup> Prior to the Rhode Island Parentage Act, state law made it cumbersome for intended parents who were not the biological parents of their children to establish their legal parentage.<sup>178</sup> Now, the legal parentage process has been revised for the first time in forty years to reflect the paradigm shift that families can take on various forms.<sup>179</sup> On the adoption of the Act, United States Secretary of Commerce and former Rhode Island Governor Gina Raimondo stated that "[n]o parent should have to jump through hoops to receive legal recognition because of their sexual orientation or the circumstances of their child's birth. The Rhode Island Uniform Parentage Act enshrines into law our belief in the validity of all paths to parenthood."<sup>180</sup>

<sup>173</sup> Bethany Bump, *Advocates call for New York to Legalize Gestational Surrogacy*, TIMES UNION (Mar. 6, 2019) <https://www.timesunion.com/news/article/Advocates-call-for-New-York-to-legalize-13667032.php> ("More than three dozen states have legalized the practice."). Gestational surrogacy agreements are legal in New York as of February 2021. N.Y. FAM. CT. ACT, Art. 5-C (Consol. 2021).

<sup>174</sup> Bump, *supra* note 173.

<sup>175</sup> Press Release, State of Rhode Island Gen. Assembly, Rhode Island Parentage Act signed into law, (July 21, 2020), [http://www.rilin.state.ri.us/pressrelease/\\_layouts/RIL.PressRelease.ListStructure/Forms/DisplayForm.aspx?List=c8baae31-3c10-431c-8dcd-9dbbe21ce3e9&ID=371007](http://www.rilin.state.ri.us/pressrelease/_layouts/RIL.PressRelease.ListStructure/Forms/DisplayForm.aspx?List=c8baae31-3c10-431c-8dcd-9dbbe21ce3e9&ID=371007).

<sup>176</sup> 15 R.I. GEN. LAWS § 15-8.1-708 (2020).

<sup>177</sup> *Id.*

<sup>178</sup> See Press Release, State of Rhode Island Gen. Assembly, *supra* note 175.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

## B. Other State Legislative Action

New York has also recently taken a stance towards expanding equality for same-sex married couples in the state, as evidenced by its adoption of the Child-Parent Security (“Act”).<sup>181</sup> The law was passed in April, 2020 and went into effect on February 15, 2021.<sup>182</sup> The Act legalizes both altruistic and paid gestational surrogacy agreements while putting protections in place to safeguard the rights of the gestational surrogate herself.<sup>183</sup> Further, the Act seeks to help intended parents more easily establish their legal parentage rights.<sup>184</sup> The parentage rights are established by eliminating the requirement for adoption proceedings, installing a mandate that gestational surrogates relinquish any parentage claims, and “establishing the legal rights of children born via assisted reproduction.”<sup>185</sup> New York’s reform is monumental because it breaks down many of the barriers that LGBTQ+ individuals and couples have faced when they wanted to start a family in the state.<sup>186</sup> Previously, gestational surrogacy agreements were banned in the state as they violated the law.<sup>187</sup> Governor Andrew Cuomo proclaimed in his 2020 State of the State that New York’s ban on gestational surrogacy was “based in fear not love.”<sup>188</sup> He conveyed his belief that it is “past time New York help LGBTQ+ couples and people struggling with fertility use common-place reproductive technology to start families.”<sup>189</sup>

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<sup>181</sup> Harriet Newman Cohen & Tim James, *Surrogacy Agreements Approved by New York...With Provisions*, LAW.COM (July 24, 2020, 3:00 PM), <https://www.law.com/newyorklawjournal/2020/07/24/surrogacy-agreements-approved-by-new-york-with-provisos/?slreturn=20200925192824>; *see also* N.Y. FAM. CT. ACT, Art. 5-C (Consol. 2021).

<sup>182</sup> Cohen & James, *supra* note 181.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Press Release, Governor Andrew M. Cuomo, Governor Cuomo Unveils 16th Proposal of 2020 State of the State: Legalizing Gestational Surrogacy, (Dec. 30, 2019), <https://www.governor.ny.gov/news/governor-cuomo-unveils-16th-proposal-2020-state-state-legalizing-gestational-surrogacy>.

<sup>189</sup> *Id.*

**VII. ANALYSIS****A. James and Ryan Have a Constitutional Right to Enter into A Gestational Surrogacy Agreement in Louisiana Under the Substantive Due Process Clause**

Under *Troxel*, James and Ryan have the constitutional rights as fit intended parents to make decisions concerning the “care, custody, and control of their child.”<sup>190</sup> As a result, it should fall within their rights to make one of the most fundamental of all parentage decisions, deciding how their child will be carried to term. Louisiana should thus recognize the use of a gestational surrogate by a same-sex married couple as a legitimate exercise of parental authority by the intended parents.

Further, James will be the biological father of the child in addition to being an intended parent with Ryan. In *P.M. v. T.B.*, the Iowa Supreme Court determined that a biological parent’s rights over his child are paramount and will trump any third-party parentage claims.<sup>191</sup> This principle supports the notion that James, who is having a child that will be genetically related to him, should be given control to decide the way his child is to be carried to term.

The defining principle of the landmark gay marriage decisions is that all married couples must be able to enjoy the same benefits that the institution of marriage provides. The right to enter into a gestational surrogacy agreement as a married intended parent is a fundamental liberty interest because it concerns the family unit. Louisiana’s surrogacy laws fail to guarantee due process of law for all married couples in the state. The “gametes” language contained in the statute implies that only opposite-sex married couples may use an altruistic gestational surrogate. This is inconsistent with all the traditions and principles of marriage that the Court in *Obergefell* found apply with equal force to same-sex marriage. First, it interferes with a person’s right to choose whom to marry.<sup>192</sup> Marriage, as Justice Kennedy pointed out, is often used as a building block to establish a

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<sup>190</sup> *Troxel v. Granville*, 530 U.S. 57, 74 (2000).

<sup>191</sup> *P.M. v. T.B.*, 907 N.W.2d 522, 543 (Iowa 2018).

<sup>192</sup> *Obergefell v. Hodges*, 576 U.S. 644, 665 (2015).

family with the person one loves.<sup>193</sup> Thus, by denying same-sex married couples the ability to use an altruistic gestational surrogate, Louisiana is wrongfully devaluing the marriage relationship between two persons of the same sex. As the laws are written, same-sex married couples are restricted from starting a family, unlike opposite-sex married couples. Next, the laws deny same-sex married couples “full liberty” because it treats their marriages as lesser than those marriages between opposite-sex couples. Third, the laws harm the interests of children because it makes it harder for same-sex parents to establish their rights as the legal parents of their children. Legal parentage is essential for a parent to make all the most important childrearing decisions, including schooling and healthcare. And finally, the laws deny those benefits to same-sex married couples that the state has explicitly linked to marriage.

Louisiana’s unlawful ban on same-sex married couples’ use of a gestational surrogate is similar to the Utah surrogacy statute that the Utah Supreme Court declared unconstitutional in *In re Gestational Agreement*.<sup>194</sup> Both statutes have terms that imply that the rights contained within the statute only apply to opposite-sex couples: the obscure “gametes” language in Louisiana limiting who the “intended parents” can be and the term “intended mother” in Utah. When the legality of a surrogacy agreement is conditioned on marriage, as the Utah Supreme Court noted, it is categorically unfair for the law to exclude same-sex married couples.

**B. James and Ryan Have a Constitutional Right to Enter into A Gestational Surrogacy Agreement in Louisiana Under the Equal Protection Clause**

Louisiana’s surrogacy laws discriminate against James and Ryan on the basis of their sexual orientation. The statutes place a biological restriction on who can enter into gestational surrogacy agreements in the state. The laws punish James and Ryan as a married same-sex couple because they are biologically unable to provide their own “sperm” and “egg.” Because the laws therefore implicitly limit gestational surrogacy to married opposite-sex couples, James

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<sup>193</sup> *Id.* at 681.

<sup>194</sup> *See supra* Section IV.B.

and Ryan can successfully assert that the laws are discriminatory on their face.

Sexual orientation is an immutable trait.<sup>195</sup> Although sexual orientation, unlike race, cannot be perceived visually, people who are gay have a trait that is distinguishable from that of the general population.<sup>196</sup> This trait is their attraction to members of the same-sex.<sup>197</sup> Because all gay individuals thus have a defining characteristic, as opposed to other groups, such as close relatives, they are a discrete group with an immutable trait.<sup>198</sup> Recent developments show that the gay community has made strides towards increasing its political influence in the country. For example, in February 2021, the United States Senate confirmed the first openly gay presidential cabinet appointee, Pete Buttigieg.<sup>199</sup> However, the gay community's lobbying power over government is still miniscule and far more rudimentary in comparison to corporate forces.<sup>200</sup> Gays' "struggle is not for special tax exemptions, but rather for simple human dignity."<sup>201</sup> Even with the successes of marriage equality and representation in government, the furtherance of basic equality alone does not equate to substantial political power on the part of the gay community.<sup>202</sup> A primary reason for the curtailment of the gay community's progress is the history of discrimination that the community has faced. Over the years, gays have suffered "numerous grisly hate crimes and deplorable employ-

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<sup>195</sup> *Sexual Orientation and Gender Identity Definitions*, THE HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> (last visited Feb. 27, 2021).

<sup>196</sup> Brett Parker, *What Level of Legal Scrutiny Should Sexual Orientation-Based Classifications Receive?*, STANFORD POL. (Jan. 19, 2015), <https://stanfordpolitics.org/2015/01/19/level-legal-scrutiny-sexual-orientation-classifications/>.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*; see *Lyng v. Castillo*, 477 U.S. 635 (1986) ("Close relatives... do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group.").

<sup>199</sup> Oliver O'Connell, *Pete Buttigieg becomes first gay cabinet member confirmed by Senate in historic vote*, THE INDEP. (Feb. 2, 2021), <https://www.independent.co.uk/news/world/americas/us-politics/pete-buttigieg-openly-gay-cabinet-member-senate-b1796535.html>.

<sup>200</sup> Parker, *supra* note 196.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*



ment injustices.”<sup>203</sup> In addition, the gay community has been victimized by legislation such as bans on same-sex marriage and “openly serving in the military.”<sup>204</sup> Discriminatory acts taken against the gay community have been fueled by prejudice. There exists no societal necessity to treat the gay community differently from any other.<sup>205</sup> The anti-gay movement therefore falls back on hateful stereotypes regarding the “immorality of homosexuality.”<sup>206</sup> These moral prejudices still run rampant in certain influential circles, hurting the ongoing struggle for gay rights and equality.<sup>207</sup> For these reasons, sexual orientation should be classified as a suspect class.<sup>208</sup>

Because James and Ryan should be considered members of a suspect class, strict scrutiny should apply against Louisiana’s gestational surrogacy laws. Under strict scrutiny, Louisiana would have to prove that its gestational surrogacy statutes achieve a compelling purpose and that no non-discriminatory alternatives exist. Louisiana would fail at demonstrating a compelling purpose. The state would likely argue that the statutes should be enforced as written because they help to promote the traditional family unit and the children’s well-being. This is not a compelling state interest because the Supreme Court reiterated in *Pavan* the notion that such moral arguments do not affect the law. Louisiana must recognize that the Federal Constitution protects married couples from being barred from the benefits of marriage on the basis of sexual orientation. The state has linked gestational surrogacy to marriage and cannot therefore deny

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.* “Don’t Ask, Don’t Tell,” which allowed for the discharge of outed gay servicemembers, was repealed on December 22, 2010. Ali Rogin, *How Don’t Ask, Don’t Tell has affected LGBTQ service members, 10 years after repeal*, PBS (Dec. 22, 2020), <https://www.pbs.org/newshour/nation/how-dont-ask-dont-tell-has-affected-lgbtq-service-members-10-years-after-repeal>.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> Evelyn Schlatter, *18 Anti-Gay Groups and Their Propaganda*, THE S. POVERTY L. CTR. (Nov. 4, 2010), <https://www.splcenter.org/fighting-hate/intelligence-report/2010/18-anti-gay-groups-and-their-propaganda>. (“These groups’ influence reaches far beyond what their size would suggest, because the “facts” they disseminate about homosexuality are often amplified by certain politicians, other groups and even news organizations.”).

<sup>208</sup> The standards for sexual orientation and gender should be the same. Gender should also be considered a suspect classification based on immutable characteristics.

access to this form of procreation to same-sex married couples for a non-compelling reason. A feasible non-discriminatory alternative also exists. Louisiana merely has to change its surrogacy statutes to clearly reflect that all married couples may use a gestational surrogate. Because Louisiana lacks a compelling purpose and has a non-discriminatory alternative, its surrogacy laws do not survive strict scrutiny.<sup>209</sup>

Currently, the Supreme Court does not recognize sexual orientation as a suspect class.<sup>210</sup> However, under the current standard, which is rational basis review “with a bite,” the statutes still fail.<sup>211</sup> The statutes fail because they can be classified as anti-gay legislation. They were passed to deny gay couples their dignity to start their family with the person they love. Such “animus” does nothing to further a legitimate interest of the state.<sup>212</sup> Instead, the hostility perpetuated by the statutes merely serves to hinder the progress of same-sex couples being treated the same as opposite-sex couples by society. There is thus no rational basis for Louisiana’s surrogacy statutes.<sup>213</sup>

The Louisiana statutes present an additional dilemma by preventing the same-sex parents of a child born from gestational surrogacy from being listed as the child’s parents on her birth certificate. The state should look to the holding of the Maryland case *In re Roberto D.B.* by not creating a parentage dispute between an intended parent and a gestational carrier when an issue between the parties did not exist in the first place. Just like the carrier in *Roberto*, Sarah does not want to be listed as the mother of James’s and Ryan’s child. Thus, when there is no parentage dispute in a gestational surrogacy situation, Louisiana should list the intended same-sex parents on their children’s birth certificates as they would for opposite-sex parents. This would drastically smooth the process of establishing legal par-

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<sup>209</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>210</sup> Parker, *supra* note 196.

<sup>211</sup> *Rational Basis Test with Bite*, *supra* note 165.

<sup>212</sup> *Romer v. Evans*, 517 U.S. 620, 632 (1996). “Amendment 2 fails, indeed defies, even this conventional inquiry... Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but *animus* toward the class it affects; it lacks a rational relationship to legitimate state interests.” *Id.*

<sup>213</sup> 576 U.S. 644 (2015).

entage and will give same-sex parents the ease of mind they need when their child is born.

### **C. Louisiana Should Adopt the Uniform Parentage Act**

In addition to reforming its gestational surrogacy statutes, Louisiana should adopt the 2017 provision of the Uniform Parentage Act. The current surrogacy laws show that the state is not yet on the path to accepting same-sex married couples as equal to opposite-sex married couples. As discussed, this presents a major problem for same-sex married couples who wish to have children and exercise their right to have a family. Adopting the revised Uniform Parentage Act would transform Louisiana's current approach by ensuring the protection of the fundamental rights of its LGBTQ+ citizens on the state level. It thus behooves Louisiana to adopt policies that encourage acceptance and equal treatment over exclusion and rejection.

### **D. Congress Should Pass Legislation to Establish A National Framework for Uniform Access to Gestational Surrogacy**

In her Article in the UC Davis Journal of Juvenile Law & Policy, Michelle Elizabeth Holland suggests that “[f]ederal law addressing gestational surrogacy should also be established in order to protect individuals from states that seek to limit or outlaw gestational surrogacy.”<sup>214</sup> Federal regulation of gestational surrogacy would be beneficial as it could remove the limitations that certain “surrogacy neutral” and “surrogacy unfriendly” jurisdictions, including Louisiana, have put in place to gatekeep the process. Congress could require that gestational surrogacy be available to both opposite-sex and same-sex married couples “while providing states the opportunity to regulate its practice as they see fit.”<sup>215</sup> For instance, the states should still be able to control whether the agreements can be altruistic, paid,

<sup>214</sup> Michelle E. Holland, Article, *Forbidding Gestational Surrogacy: Impeding the Fundamental Right to Procreate*, 17 UC DAVIS J. JUV. L. & POL'Y 1, 26 (2013).

<sup>215</sup> *Id.* at 26-27.

or if either option is permitted. This approach represents the best solution to the problem because it ensures that protections are codified on the federal level for intended same-sex parents while still respecting state sovereignty.

### **VIII. CONCLUSION**

The ability for James and Ryan to enter into a gestational surrogacy agreement in Louisiana is protected by the Substantive Due Process and Equal Protection Clauses of the United States Constitution. The United States Supreme Court has ruled that substantive due process protects a parent's right to make decisions for their children. This right extends to unborn children because even a child that is not born can have at least one intended parent who is biologically related to her, like James. Courts have given such intended parents the right to make decisions on the unborn child's behalf. Equal protection demands that same-sex and opposite-sex married couples are treated the same under the law. Louisiana's surrogacy statute violates this right by precluding same-sex married couples from using a gestational surrogate. It is therefore necessary for the state to reform its surrogacy laws so that it can pass constitutional muster and finally recognize same-sex married couples' rights under the United States Constitution.